LIBRARY
SUPREME COURT, U. S.

NOV 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 196

DONALD DESIMONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK,
Attorney for Petitioner,
225 Broadway,
New York, N. Y. 10007.
(212) 732-1322

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Statement	1
ARGUMENT—The expanding nature of the protection offered by the Fourth Amendment should be broadened to encompass a passenger in an automobile whose property may have been unlawfully seized therefrom	2
Conclusion	5

TABLE OF CASES

Alderman v. United States (argued week of Oct. 14th)	5
Granello v. United States, 386 U. S. 1019	4
Jones v. United States, 362 U. S. 257	2
Katz v. United States, 389 U. S. 347	2
Lee v. Florida, 20 L. Ed. 2d 1166 (1968)	4
Mancusi v. De Forte, 20 L. Ed. 2d 1154	2
Mapp v. Ohio, 367 U. S. 643	3
Silverthorne Lumber Co. v. United States, 251 U. S. 385	4
Weeks v. United States, 232 U. S. 383	3

STATUTES CITED

18 U. S. C. § 371	1
18 U. S. C. § 656	1
F. C. C. Act Section 605	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 196

DONALD DESIMONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, Donald DeSimone, petitions this Court for rehearing of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. This Court denied certiorari on the 14th of October, 1968.

Petitioner was convicted of Conspiracy to violate 18 U.S.C. § 656 (embezzlement of checks from a bank insured with the F.D.I.C.) in violation of 18 U.S.C. § 371 and two substantive counts of the same nature after trial in the United States District Court, Southern District of New York.

ARGUMENT

The expanding nature of the protection offered by the Fourth Amendment should be broadened to encompass a passenger in an automobile whose property may have been unlawfully seized therefrom.

After the brief on the original Petition for Certiorari was filed, this Court decided *Mancusi* v. *DeForte,* 20 L. Ed. 2d 1154.

It should be borne in mind in the case at bar that not only did the Courts below hold that the Petitioner was not entitled to a hearing on his Rule 41(e) motion to suppress, but that he was not even to be permitted to conduct a *voir dire* of the federal agent to at least demonstrate that he might have "standing".

The district Judge, without a hearing could possibly come to a conclusion on principles of "law". But the decision of Herlands, D.J. was that there was not to be a hearing for "factual" reasons too when no evidence had been adduced at a hearing. This certainly was a violation of due process and deprived the defendant of his "day in court".

In *DeForte, supra,* this Court has just recently held that the doctrine of *"standing"* cannot be limited to one's house. It must necessarily be broadened to include commercial premises as well.

In *DeForte,* this Court noted, citing *Jones* v. *United States,* 362 U. S. 257, that anyone on "premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him."

Then citing *Katz* v. *United States,* 389 U. S. 347, this Court further observed that "capacity to claim the protection of the Amendment [Fourth Amendment] depends not upon a property right in the invaded place, but upon

whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion" (20 L. Ed. 2d 1159).

While the automobile in which DeSimone was riding may not have been his own, although this was only assumed from documentary evidence, and the possibility of "agency" could not be probed, DeSimone still had the right to determine whether he had been victimized in violation of the Fourth Amendment since there was no reason for him to assume that this car would be the subject of a governmental intrusion.

Moreover, it was a typewriter that was seized and not "checks" which the government was primarily looking for.

The government is an "adversary" and as such its motives are not automatically free from scrutiny or suspicion.

The important issue to be resolved is that the intrusion into the car of the person who drove DeSimone was never justified. No reason was required. The Courts below simply dismissed the matter without any probing at all on the basis of "standing". Whether or not this Court considered the case of *Mancusi* v. *DeForte, supra,* is unknown. Certainly, however, it should once and for all be recognized that when the Government seizes evidence illegally, it is barred from using it or its fruits against anyone else. The only other rationale is to emasculate the Fourth Amendment altogether.

It is deterrence of official illegality that has raised the exclusionary rule to constitutional dignity since no other restraint seems sufficient to discourage lawlessness of law enforcement officers. (*Mapp* v. *Ohio,* 367 U. S. 643; *Weeks* v. *United States,* 232 U. S. 383.)

This approach also was recently applied in the case of wiretaps in violation of the F.C.C. Act Section 605 where this Court stated that such evidence could not be used.

See: *Lee* v. *Florida*, 20 L. Ed. 2d 1166 (1968).

In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, this Court ruled that evidence obtained in violation of the Fourth Amendment not only could not be used for the prime purpose, *but could not be used at all.*

The decision in the instant case encourages "exploratory" searches in violation of every precept of decency and lawfulness since the Government could deliberately search A's private apartment or office knowing "A" could suppress the evidence, but nevertheless hoping to find evidence against "B", "C", "D", etc., who under current rulings would "lack standing" on a motion to suppress. This makes a mockery of the Fourth Amendment.

It is submitted that in view of the fact that *DeForte* was not cited in the original Petition because it was unknown then, that this Court should rehear and reconsider this petition in the light of that case and the arguments advanced.

No person possibly aggrieved of an unlawful search and seizure should be denied both a hearing and even a *voir dire* at trial. This is what happened to Petitioner herein. The trial judge foreclosed a hearing because the pretrial suppression motion was denied without a hearing. Why was a *voir dire* denied too?

It seems that the Government operates from a privileged sanctuary which not only permits it to conduct any kind of trespassory incursion so long as the party complaining lacks "standing", but on top of that may even deny that person a *voir dire* to inquire into the possibility that he has been aggrieved. (*Granello* v. *United States*, 386 U. S. 1019.) The government has recently argued, anomalously, that despite its own admission that it has engaged in lawless conduct (eavesdropping), this Court and the defendant must accept *its* word that its self-confessed lawless agents have not obtained any incriminating material from

their lawless invasions. (*Alderman* v. *United States*, argued week of October 14th.)

In the instant case, the seizure of the typewriter was powerful and damaging evidence. Certainly an inquiry should have been permitted to prove the issue of standing.

CONCLUSION

The motion for reconsideration and rehearing should be granted.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

November 4, 1968.

Certification

Irving Anolik, attorney for Petitioner, and a member of the Bar of this Court certifies that this petition for rehearing is submitted in good faith and not for the purpose of delay.

IRVING ANOLIK.